or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. *New York* v. *Sage, ubi supra.* *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76, 80. *Shoemaker* v. *United States*, 147 U. S. 282, 305. *Kerr* v. *South Park Commissioners*, 117 U. S. 379, 386. *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2d) 297, 304. The use of shorelands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract together with the other shorelands for reservoir purposes or that another could acquire all lands or easements necessary for that use. The trespass committed by means of the dams added nothing to the value of the shorelands.

Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure (*United States* v. *New River Collieries*, 262 U. S. 341, 344) is lacking, the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. Cf. *The Minnesota Rate Cases, supra*, p. 452. *Smith* v. *Illinois*

Bell Tel. Co., 282 U. S. 133, 152. *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U. S. 287, 319.

Petitioners rely on *Boom Co.* v. *Patterson*, 98 U. S. 403. At the time of that condemnation, logs belonging to many owners were floated down the Mississippi to sawmills at and below the Falls of St. Anthony. Patterson owned three islands, about 34 acres, in the river a few miles above the falls, lying near to each other and approximately parallel to the west bank. The company, merely by closing the spaces between the islands and connecting the downstream end to the bank so as to prevent the passage of floating logs, created a boom about a mile long and a quarter of a mile wide. The owner objected to that use of his property and the company condemned. There was evidence of value other than for boom purposes and also of value for all purposes. The jury specially found that aside from boom purposes the value of the land was $300 and that, in view of the adaptability for boom purposes, it had an additional value of $9,058.33. There was a general verdict for the sum of these amounts. The court ordered the verdict set aside unless the owner consent to reduce it to $5,500. He did consent and judgment was entered for that amount.

Upon appeal this court affirmed and, speaking through Mr. Justice Field, said (p. 407-409): "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted . . . . The position of the three islands . . . fitting them to form, in connection with the west bank . . . a boom of immense dimensions . . . added largely to the value of the lands. . . . Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. . . ". . . The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners."

The principle governing that case has been frequently applied here[3] and in the lower federal courts.[4] The decision is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment.[5] But clearly it does not support petitioners' contention here. The circumstances there disclosed required submission to the jury of the question whether the use and special adaptation of the islands for boom purposes affected market value at the time of the taking. They were amply sufficient to warrant a finding that the islands were well suited and presently needed for that purpose and that demand for them, actual or prospective, to form a part of a boom greatly enhanced their market value. The boom company could not exclude others from handling logs floated in the river. The owner and others had the right to use the island lands to construct a boom for their own purposes or for general use.

The situation in respect of lands bordering the Lake of the Woods is essentially different. The fact that the raising of the lake would take or damage shorelands could not affect their market value. There could be no rational basis for any demand that would affect value to the owner for reservoir purposes unless, as a legal and practical possibility, he or some other person or persons—

[3]Chicago, Burlington &c. R'd *v.* Chicago, 166 U. S. 226, 250. Boston Chamber of Commerce *v.* Boston, 217 U. S. 189, 195. United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 77. McGovern *v.* New York, 229 U. S. 363, 372. The Minnesota Rate Cases, 230 U. S. 352, 451. Vogelstein & Co. *v.* United States, 262 U. S. 337, 340. United States *v.* New River Collieries, 262 U. S. 341, 344. Mitchell *v.* United States, 267 U. S. 341, 345.

[4]Murhard Estate Co. *v.* Portland & Seattle Ry. Co., 163 Fed. 194, 199. Weiser Valley Land & Water Co. *v.* Ryan, 190 Fed. 417, 421-422. Denver & R. G. R. Co. *v.* Mills, 222 Fed. 481, 489. Northern Pac. Ry. Co. *v.* North American Tel. Co., 230 Fed. 347, 356. North American Telegraph Co. *v.* Northern Pac. Ry. Co., 254 Fed. 417, 419. United States *v.* Boston, C. C. & N. Y. Canal Co., 271 Fed. 877, 893. Ford Hydro-Electric Co. *v.* Neely, 13 F. (2d) 361, 362. Guste *v.* United States, 55 F. (2d) 115, 116.

[5]Illustrative cases are: Fales *v.* Easthampton, 162 Mass. 422, 425. Smith *v.* Commonwealth, 210 Mass. 259, 261. North Shore R. R. Co. *v.* Penna. Co., 251 Pa. 445, 450. R. I. & P. Ry. Co. *v.* Leisy Brewing Co., 174 Ill. 547, 555. Currie *v.* Waverly, &c., R. R. Co., 52 N. J. L. 381, 396. Russell *v.* St. Paul, Minneapolis & Manitoba Ry. Co., 33 Minn. 210, 214. Conan *v.* City of Ely, 91 Minn. 127, 131. Santa Ana *v.* Harlin, 99 Cal. 538, 542. Alloway *v.* Nashville, 88 Tenn. 510, 519.

other than the expropriating authority—could have acquired the right to flow the lands necessary for the lawful raising of the lake. The lands upon which the flowage easement is condemned are located in two countries. Neither could authorize expropriation in the other. Petitioners did not cite or offer evidence of any instance of acquisitions, without reliance upon the power of eminent domain, that are at all comparable with those under consideration. When regard is had to the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with, it is clear that there is no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question.

The policy of joint governmental control of the lake levels was indicated years before the taking. The lands in Manitoba and Ontario that long prior to the condemnation were reserved in anticipation of measures to be taken for the raising of the lake level were essential to the enterprise. Additional reservoir capacity could not lawfully be created without them and they could not be purchased or condemned. There was no justifiable basis for competition for the purchase of flowage rights from private owners. Rivalry between power companies or others to secure opportunity to develop capacity resulting incidentally from lake levels established in the settlement of, or to prevent, controversy between the parties to the treaty or between either of them and nationals of the other is too remote to warrant a finding that market value of petitioners' lands was thereby enhanced. It had no direct, and could have no substantial or legitimate, influence upon such value.

As just compensation includes no increment resulting from the taking, petitioners were not entitled to elements of value arising from the prospect that the Government would acquire the flowage easements. Under the circumstances, intention to acquire was the equivalent of the formal designation of the property to be taken. Prices actually paid, and estimates or opinions based, upon the assumption that value to owners includes any such elements are not entitled to weight and should not be taken into account. On the facts shown, it conclusively appears that there was no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for

reservoir purposes. The evidence covered by petitioners' offers was inadmissible. The court rightly excluded reservoir uses from consideration.

In their brief, petitioners complain that the trial court instructed the jury "to consider only the value of the lands for agriculture, although it was admitted that the lands were not suitable for agriculture and had never been used for that purpose". The parts of the charge above quoted show that the statement is without foundation as to Olson's land and inaccurate as to all. The record definitely shows that petitioners did not claim that, except for reservoir purposes, their lands are worth more than their value for agriculture. Moreover, the point is not made in the specification of errors or in the reasons given in the petition for this writ. The contention is not properly before us. *Gunning* v. *Cooley*, 281 U. S. 90, 98.

Petitioners maintain that the Circuit Court of Appeals erred in holding that the Treaty of 1909 did not give redress, and that they had no remedy, for the wrongful flooding of their lands. The statements in the opinion assailed by specifications of error in petitioners' brief were made *arguendo* and do not constitute decision of any point on which petitioners there sought reversal. The questions considered below concerned compensation for flowage easements. The condemnation was under section 1 of the Act of May 22, 1926, *supra*. The property taken was the right to use in the future. The commissioners were not authorized to make any award on account of damages caused by unlawful flooding of shorelands prior to the taking. That is clear from section 1, and especially so when its provisions are read in connection with the general condemnation Act of August 1, 1888, 25 Stat. 357, and the rule of just compensation prescribed by the Constitution of Minnesota, both of which are expressly adopted by that section. Moreover, section 3 directs the Secretary of War to deal with all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets. No question of liability for, or the amount of, such damages was before the lower courts.

Judgments affirmed.